EMERY SHAZMAL ABD MALEK v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEALS NO: M-05-36-02-2015, M-05-52-03-2015, M-05-56-03-2015, M-05-57-03-2015, M-05-58-03-2015 & M-05-60-03-2015]
16 JUNE 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons convicted for offences relating to drugs and poisons – Various drugs and poisons found in house during police raid – Death sentence – Whether prosecution successfully established prima facie case – Accused persons denied knowledge of drugs – Whether defence probable and raised doubts on prosecution's case – Whether mere denial – Whether convictions and sentences safe – Dangerous Drugs Act 1952, ss. 12(2) & 39B(1)*

Following a raid at a house by the police, the accused persons were arrested and charged at the High Court for drugs and poisons offences under ss. 39B(1)(a) and 12(2) of the Dangerous Drugs Act 1952 ('the DDA'), respectively. A search conducted on the house led to the discovery of (i) 226.32g of methamphetamine; (ii) 2,575.34g of ketamine; (iii) 1.37g nimetazepam; (iv) pseudeophedrine in tablet and liquid forms; (v) dextomethorphan in powder and liquid forms; and (vi) 19.24g of chloroquine. According to the prosecution, the drugs were at the state of ready for distribution. At the end of the prosecution's case, the trial judge found that a *prima facie* case had been made out against all the accused persons. The trial judge further found that the fourth accused, as the registered owner and occupant of the said house together with her husband, the first accused, ought to have knowledge coupled with custody and control of the drugs and poisons found in the house. The accused persons were called to enter their defences. In their defence, (i) the first and fourth accused persons denied knowledge of the drugs; (ii) the second, third, sixth and seventh accused persons testified that they were invited to the house by the first accused; and (iii) the fifth accused maintained that she was working in the house as a maid and denied knowledge of the drugs. The trial judge found that the defence put up by the accused persons, except the fourth and fifth accused persons, were mere denials and did not raise any reasonable doubt on the prosecution's case. The defence of the fourth and fifth accused persons were accepted. The first, second, third, sixth and seventh accused persons were convicted for the offence and sentenced to death; hence, the present appeals by them against their convictions and sentences.

Held (dismissing appeal by first accused; allowing appeals by second, third, sixth and seventh accused persons)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) At the time of their arrest, none of the accused persons were engaged in the processing or manufacturing of the impugned drugs. There was insufficient evidence to show that the second, third, sixth and seventh accused persons were involved in the processing and manufacturing drugs, as found by the trial judge. The chemist found no traces of drugs on the clothes or bodies of the accused persons and no finger printings or DNA of all the accused persons on the paraphernalia found in the said house. There was also no hard and compelling evidence to show common intention of all the accused persons. (paras 37, 38 & 39)

(2) The trial judge did not sufficiently appreciate the defence of the second, third, sixth and seventh accused persons. Their cautioned statements were not considered at all. It was the bounden duty of the trial judge at the close of the defence case to judicially consider the explanations given by the defence witnesses in its entirety. However, the trial judge brushed aside the defence version by saying that they were bare denials. The trial judge was so consumed by his conviction of the accused persons' guilt that he had overlooked to evaluate the whole evidence adduced at the end of the defence case. (para 52)

(3) The conviction of the first accused was safe and the conviction and sentence imposed upon him were affirmed. The convictions of the second, third, sixth and seventh accused persons were not safe and their convictions and sentences were quashed. The second, third, sixth and seventh accused persons were acquitted and discharged. (paras 58 & 59)

Bahasa Malaysia *Headnotes*

Susulan serbuan pihak polis di sebuah rumah, tertuduh-tertuduh ditahan dan didakwa di Mahkamah Tinggi atas kesalahan berkaitan dadah dan racun, masing-masing di bawah ss. 39B(1)(a) dan 12(2) Akta Dadah Berbahaya ('ADB'). Penggeledahan rumah tersebut mendapati (i) 226.32g methamphetamine; (ii) 2,575.34g ketamine; (iii) 1.37g nimetazepam; (iv) pseudeophedrine dalam bentuk pil dan cecair; (v) dextomethorphan dalam bentuk serbuk dan cecair; dan (vi) 19.24g of chloroquine. Menurut pihak pendakwaan, dadah-dadah tersebut dalam keadaan sedia untuk diedar. Di akhir kes pendakwaan, hakim bicara mendapati bahawa satu kes *prima facie* berjaya dibuktikan terhadap tertuduh-tertuduh. Hakim bicara selanjutnya memutuskan bahawa tertuduh keempat, selaku pemilik berdaftar dan penghuni rumah tersebut bersama-sama dengan suaminya iaitu tertuduh pertama, semestinya mempunyai pengetahuan serta jagaan dan kawalan atas dadah dan racun yang dijumpai. Tertuduh-tertuduh dipanggil membela diri masing-masing. Dalam pembelaan mereka, (i) tertuduh pertama dan keempat menafikan pengetahuan tentang dadah; (ii) tertuduh kedua, ketiga, keenam

dan ketujuh menyatakan bahawa mereka diundang ke rumah tersebut oleh tertuduh pertama; dan (iii) tertuduh kelima menyatakan bahawa dia cuma bekerja di rumah tersebut sebagai pembantu dan menafikan pengetahuan tentang dadah yang dijumpai. Hakim bicara memutuskan bahawa pembelaan tertuduh-tertuduh, kecuali tertuduh keempat dan kelima, hanyalah penafian belaka dan tidak membangkitkan keraguan munasabah terhadap kes pendakwaan. Pembelaan tertuduh keempat dan kelima diterima. Tertuduh pertama, kedua, ketiga, keenam dan ketujuh disabitkan atas kesalahan dan dijatuhkan hukuman mati; maka timbul rayuan ini oleh mereka terhadap sabitan dan hukuman yang dijatuhkan.

Diputuskan (menolak rayuan tertuduh pertama; membenarkan rayuan tertuduh kedua, ketiga, keenam dan ketujuh)
Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Semasa ditahan, tidak seorang pun tertuduh yang didapati sedang membuat atau memproses dadah. Keterangan tidak cukup untuk menunjukkan tertuduh kedua, ketiga, keenam dan ketujuh terlibat dalam pembuatan dan pemprosesan dadah, seperti yang didapati oleh hakim bicara. Ahli kimia tidak menjumpai apa-apa kesan dadah pada pakaian mahupun badan tertuduh-tertuduh dan tiada cap jari atau DNA tertuduh pada perkakasan dijumpai di dalam rumah tersebut. Tiada keterangan yang kuat dan kukuh untuk menunjukkan niat bersama antara tertuduh-tertuduh.

(2) Hakim bicara tidak mempertimbangkan pembelaan tertuduh kedua, ketiga, keenam dan ketujuh secukupnya. Pernyataan beramaran mereka tidak dipertimbangkan langsung. Hakim bicara berkewajipan mempertimbangkan semua penjelasan yang diberi oleh saksi-saksi pendakwaan secara menyeluruh di akhir kes pembelaan. Walau bagaimanapun, hakim bicara menolak dan mengetepikan versi pembelaan dengan memutuskan bahawa kesemuanya penafian belaka. Hakim bicara begitu yakin dengan sabitan kebersalahan tertuduh-tertuduh hinggakan beliau terlepas pandang untuk menilai keseluruhan keterangan di akhir kes pembelaan.

(3) Sabitan tertuduh pertama selamat dan sabitan dan hukuman yang dijatuhkan terhadapnya disahkan. Sabitan tertuduh kedua, ketiga, keenam dan ketujuh tidak selamat dan sabitan dan hukuman yang dijatuhkan atas mereka dibatalkan. Tertuduh kedua, ketiga, keenam dan ketujuh dilepaskan dan dibebaskan.

Case(s) referred to:
Adiswaran Tharumaputrintar v. PP & Other Appeals [2014] 3 CLJ 813 FC ***(refd)***
Ahmad Ibrahim v. PP [2012] 7 CLJ 445 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Kamarul Farkaruddin Mohamed lwn. PP [2013] 7 CLJ 636 HC ***(refd)***
Melvani v. PP [1971] 1 LNS 78 HC ***(refd)***

Mohd Roziman Saaidon & Anor v. PP [2015] 9 CLJ 665 HC ***(refd)***
Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Shah Rehan Abdul Rahman v. PP [2015] 4 CLJ 71 CA ***(refd)***
Yap Chin Chai v. PP [2010] 4 CLJ 693 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399(2)
Dangerous Drugs Act 1952, ss. 15(1)(a), 37(da)(xvi)

For the 1st accused - Nahdan Rengganathan Abdullah & JJ Lee; M/s A Rengganathan & Co
For the 2nd, 3rd & 6th accused - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the 7th accused - Wan Azwan Aiman & Tania Scivetti; M/s Scivetti & Assocs
For the respondent - Muhamad Azmi Mashud & Norinna Bahadun; DPPs, AG's Chambers

[Editor's note: Appeal from High Court, Melaka; Criminal Trial No: 45A-1-2011 (overruled in part)].

Reported by Najib Tamby

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] The appellants in appeals No: 05-36-02-2015, 05-56-03-2015, 05-57-03-2015, 05-58-03-2015 and 05-60-03-2015 were jointly tried with the two respondents in appeal No: 05-52-03-2015 in the court below for various drug and poison offences. In the court below the accused persons were:

(i) Goh Eng Tee	–	first accused (appellant in case No: 05-57-03-2015);
(ii) Sow Teik Lee	–	second accused (appellant in case No: 05-56-03-2015);
(iii) Emery Shazmal bin Abd Malek	–	third accused (appellant in case No: 05-36-02-2015);
(iv) Teo Bee Keng	–	fourth accused (first respondent in case No: 05-52-03-2015);
(v) Tursini binti Turida	–	fifth accused (second respondent in case No: 05-52-03-2015);
(vi) Lin Xi Ren	–	sixth accused (appellant in case No: 05-60-03-2015);
(vii) Ye Yu Feng	–	seventh accused (appellant in case No: 05-58-03-2015);

[2] All the accused persons were charged and tried for three drug and three poison offences. The charges read as follows (P3 at pp. 1893-1896 AR vol. 10):

1st Charge

Bahawa kamu bersama-sama pada 4.6.2010 jam lebih kurang 1.30 pagi di alamat rumah No.22 Jalan SP 1 Taman Semabok Permai, Melaka di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapati mengedar dadah berbahaya jenis Methamphetamine berat bersih 226.32 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

2nd Charge

Bahawa kamu bersama-sama pada 4.6.2010 jam lebih kurang 1.30 pagi di alamat rumah No.22 Jalan SP 1 Taman Semabok Permai, Melaka di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapati mengedar dadah berbahaya jenis Ketamine berat bersih 2575.34 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

3rd Charge

Bahawa kamu bersama-sama pada 4.6.2010 jam lebih kurang 1.30 pagi di alamat rumah No.22 Jalan SP 1 Taman Semabok Permai, Melaka di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah ada dalam milikan kamu dadah berbahaya iaitu Nimetazepam berat bersih 1.37 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama dan dibacakan bersama di bawah Seksyen 34 Kanun Keseksaan.

4th Charge

Bahawa kamu bersama-sama pada 4.6.2010 jam lebih kurang 1.30 pagi di alamat rumah No. 22 Jalan SP 1 Taman Semabok Permai, Melaka di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapati ada dalam milikan kamu 1800 tablet yang mengandungi PSEUDOEPHEDRINE berat tablet 232.86 gram dan cecair yang mengandungi PSEUDOEPHEDRINE sebanyak 140 mililiter dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 12(2) Akta Racun 1952 dan boleh dihukum di bawah Seksyen 32(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

5th Charge

Bahawa kamu bersama-sama pada 4.6.2010 jam lebih kurang 1.30 pagi di alamat rumah No.22 Jalan SP 1 Taman Semabok Permai, Melaka di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapati ada dalam milikan kamu bahan likat yang mengandungi DEXTROMETHORPHAN berat 63.27 gram, serbuk yang mengandungi DEXTROMETHORPHAN seberat 0.13 gram dan cecair yang mengandungi DEXTROMETHORPHAN

sebanyak 500 mililiter dan dengan itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Racun 1952 dan boleh dihukum di bawah Seksyen 32(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

6th Charge

Bahawa kamu bersama-sama pada 4.6.2010 jam lebih kurang 1.30 pagi di alamat rumah No.22 Jalan SP 1 Taman Semabok Permai, Melaka di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapati ada dalam milikan kamu bahan serbuk yang mengandungi CHLOROQUINE berat serbuk 19.24 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Racun 1952 dan boleh dihukum di bawah Seksyen 32(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] For avoidance of any doubt, the appellants and the respondents are referred to in our judgment as they were in the court below.

[4] At the conclusion of the trial, the learned trial judge acquitted both the fourth and the fifth accused persons. His Lordship then convicted all other accused persons in respect of all the six charges. All the convicted accused persons were sentenced to death for the trafficking charges. For the third charge, they were sentenced to five years imprisonment whilst the fourth to the sixtth charges, they were sentenced to one year imprisonment for each charge. All the imprisonment sentences were ordered to run concurrently with effect from the date of their arrests.

[5] We heard the appeals on 6 April 2016 and on 6 May 2016. We unanimously allowed the appeal by the second, the third, the sixth and the seventh accused persons whereby we set aside their convictions and sentences and set them free. Whereas, we dismissed the appeal of the first accused. We affirmed the convictions and sentences imposed by the learned trial judge. We now give our reasons.

[6] At the outset, the learned deputy withdrew their appeal against the acquittal of the fourth and the fifth accused persons. We struck out the appeal by the prosecution and we affirmed the decision of the learned trial judge in acquitting both the respondents.

The Prosecution's Case

[7] Briefly, the prosecution's case is as follows. On 4 June 2010 at around 1.30am, based on information received, Insp Mohd Hisham bin Ab Rahman (SP10) led a police party to raid a double-storey dwelling house described as No. 22, Jalan SP 1, Taman Semabok Permai, Malacca ("the said house"). The said house was registered in the name of Teo Bee Keng, the fourth accused, who is the wife of the first accused. Upon arrival, SP10 rang the doorbell. The door was opened by the first accused. SP10 identified himself as a police officer and asked the first accused to open the gate to the house compound. The first accused did so.

[8] SP10 and his men gained entry to the said house and at the same time the first accused was detained. It was SP10's version that upon gaining entry to the said house he saw both the second and the third accused persons running from the direction of the back room to the kitchen. They were also detained. Meanwhile SP10 said that both the fourth accused and the fifth accused were detained when they came down from the upper floor of the said house.

[9] Evidence was adduced that both the sixth and the seventh accused persons, who are Chinese nationals, were detained in one of the back rooms of the upper floor of the said house.

[10] A search was then conducted of the said house and various drugs, poisons and paraphernalia were found in all over the house except in the master bedroom. These can be seen from the search list (P69) prepared by SP10 and signed by all the accused persons (at pp. 2140-2164 AR Vol. 11).

[11] All the exhibits suspected to be dangerous drugs, poisons and paraphernalia were later sent to the chemist, Azmira binti Abd Rahman (SP5). After her analysis, SP5 confirmed that the exhibits handed over to her by the investigating officer, ASP Saw Heng Chye (SP19) contained methamphetamine with a net weight of 226.32g (first charge), ketamine 2,575.34g (second charge) and nimetazepam 1.37g (third charge). All were dangerous drugs under the DDA. SP5 further found that part of the exhibits contained poisons such as pseudoephedrine in tablet form weighing 232.86g and 140ml in liquid form (fourth charge), dextromethorphan weighing 43.27g, 0.13g in powdery form and 500ml in liquid form (fifth charge) and chloroquine weighing 19.24g (sixth charge). The chemist report prepared by SP5 was tendered as an exh. P35 (at pp. 2020-2039 AR Vol. 10).

Findings By The Learned High Court Judge

[12] At the end of the prosecution's case, the learned trial judge found that a *prima facie* case had been made out against all the accused persons. The trial judge found that the fourth accused as the registered owner of the said house and lived in the said house together with her husband, the first accused with their three children surely had the care and management of the said house. The first accused was the one who opened the door when SP10 and his team came to the said house. The first and fourth accused ought to have knowledge coupled with custody and control of the drugs and poisons found in the said house.

[13] As regards to the second and third accused persons, the trial judge accepted the evidence that both had ran away from the first room on the ground floor towards the direction of the kitchen. As there were drugs, poisons and paraphernalia recovered from the said room, the learned trial judge inferred knowledge of the exhibits on the part of the second and the third accused persons.

[14] In respect of the fifth accused, the trial judge found that as the fifth accused had worked as a maid in the said house for two years prior to the arrest, she also could have knowledge of the exhibits as well as being involved in the processing and manufacturing of the dangerous drugs.

[15] As for the sixth and the seventh accused, the learned trial judge held that it was not a mere coincidence for them to be in the said house. They were not mere visitors of the said house. In fact they followed the second accused to the said house to manufacture dangerous drugs.

[16] The learned trial judge accepted and believed the evidence given by the prosecution's witnesses. Their evidence were credible and there was no reason for the prosecution's witnesses to frame all the accused persons. Besides, the trial judge was satisfied that all the accused persons had a common intention to manufacture and to traffic in the dangerous drugs.

[17] For the element of trafficking, the trial judge invoked the presumption under s. 37(da)(xvi) of the DDA in respect of methamphetamine in the first charge. As for the second charge in respect of ketamine, the learned trial judge made a finding that based on the amount of drugs involved ie, 2,575.34g, the said drugs were not for their own consumption.

[18] Based on the findings by the trial judge, all the accused persons were directed to enter their defence.

The Defence Case

[19] The first and the fourth accused persons elected to give statement from the dock. Whereas the second, the third, the fifth, the sixth and the seventh accused persons gave their evidence under oath.

[20] In his statement from the dock, the first accused stated that two to three days before the raid, he was in Muar on business matters. He was running a car-wash business. He only came back around 10.30 pm on the night the police came to his house. When he heard the bell rang he was asleep on the sofa in the living room. He opened the door for the police to come into his house. He denied any knowledge about the drugs activity that had taken place in his house.

[21] In her statement from the dock, the fourth accused stated that at the time the police team came to her house, she was sleeping in the master bedroom upstairs with her three children. Three police officers came to her room and asked her to go downstairs. She was arrested and taken to the police station. She denied any knowledge about the drugs activity that had taken place in her house.

[22] The second, third, sixth and seventh accused persons respectively testified that they were visitors to the said house. They came to the said house at the invitation of the first accused. The third accused brought the two Chinese nationals as visitors and the second accused to the said house. The first and second accused were friends and first accused offered the second,

sixth and seventh accused to stay in his house while the two Chinese nationals were in Malaysia. When the police came to the said house, the second, third, sixth and seventh accused had just come to the said house after their visits to Muar and Malacca.

[23] The fifth accused testified that she was in the said house working as a maid for the family. She was only allowed to use the third room upstairs for sleeping purposes only but she was not allowed to use the third room's bathroom. She further told the court that her belongings were kept in the storeroom beneath the stairs. She also denied any knowledge about the drugs activity that had taken place in the house.

[24] At the end of the trial, the learned trial judge found that the defence of the first, second, third, sixth and seventh accused persons cannot be believed. The learned trial judge also found that the defence put up by all of them were mere denials and did not raise any reasonable doubt on the prosecution's case. They also failed to rebut the presumption of trafficking on the balance of probabilities in respect of the first charge. The first, second, third, sixth and seventh accused persons were convicted and sentenced accordingly.

[25] As regards to the fourth and the fifth accused persons, the learned trial judge had accepted their defence. The trial judge held that both accused persons had raised reasonable doubt on their actual role in the said offences. In his judgment, the learned trial judge held that (at pp. 81-82 AR vol. 1):

> 29. Bagaimanapun lain pula dengan pembelaan OKT4 dan OKT5. Berdasarkan kes *PP v. Mat, supra*, dan *Abdul Rahim Abdul Razak, supra*, walaupun saya tidak berapa yakin dengan keterangan mereka, terutamanya OKT5 yang pada pandangan saya dia tahu apa yang berlaku dalam rumah itu, namun setelah saya analisa keterangan yang telah dikemukakan oleh OKT5, saya mempunyai keraguan yang munasabah tentang peranan sebenar OKT5. Pada pandangan saya, OKT5 hanyalah seorang pembantu rumah walaupun di bilik 3, yang dikatakan dia dibenarkan tidur, terdapat barang-barang salah sepertimana yang dibuktikan oleh pendakwaan. Namun tidak dicabar bahawa OKT5 hanya dibenarkan tidur di bilik 3 itu bagi tujuan menjaga anak-anak OKT1 dan OKT4 sahaja. Saya menerima keterangan OKT5 bahawa dia tidak dibenarkan oleh majikannya untuk menggunakan bilik air bilik 3 itu. Itu menjelaskan kenapa tiada barang peribadinya dijumpai dalam bilik tersebut (termasuk bilik air). Kedudukan OKT5 yang hanya menerima arahan sahaja dibuktikan lagi dengan hakikat bahawa pakaiannya hanya disimpan dalam stor kecil di bawah tangga. Hakikat ini tidak dicabar langsung oleh pendakwaan. Walaupun saya percaya OKT5 tahu apa yang berlaku dalam rumah tersebut, namun pengetahuan semata tidak mencukupi untuk mensabitkan OKT 5 dengan kesalahan yang dipertuduhkan. Setelah diperhalusi lanjut keterangannya, saya mempunyai keraguan yang munasabah ke atas kes terhadap OKT5. Dengan itu, saya dapati pendakwaan telah gagal membuktikan kes terhadap OKT5 tanpa keraguan yang munasabah. Susulan itu, saya melepaskan dan membebaskan OKT5.

30. Begitu juga dengan pembelaan OKT4. Walaupun saya tidak berapa yakin dengan keterangan terutamanya, rumah tersebut telah didaftarkan atas namanya dan terdapat juga kesan DNA di tingkat 2 iaitu di bilik anaknya (bilik 3), namun saya ada keraguan tentang peranannya yang sebenar dalam kes ini terutamanya pada malam tersebut dia dikatakan tidur dalam bilik bersama ketiga-tiga orang anaknya. Ini diperjelaskan dalam gambar P30 (50, 51, 52) yang menunjukkan anak-anaknya ada tidur dalam bilik tersebut. Di peringkat ini ada keraguan tentang kes pendakwaan terhadap OKT4. Walaupun saya tidak begitu yakin tetapi saya ada keraguan tentang peranan OKT4, dengan sedemikian saya dapati pendakwaan telah juga gagal membuktikan kes terhadap OKT4 tanpa keraguan yang munasabah. Dengan itu saya melepaskan dan membebaskan OKT4 daripada semua pertuduhan.

The Appeal

[26] Before us, learned counsel for the second, third and the sixth accused persons canvassed the following four grounds in his submissions:

(i) that the learned trial judge did not undertake a maximum evaluation on the evidence adduced by the prosecution. Had this been done, the court would have found that there was no *prima facie* case of both possession and trafficking charges;

(ii) in respect of the trafficking charges, the learned trial judge misdirected himself when he ruled that the second, third and sixth accused persons were processing and/manufacturing the drugs;

(iii) that the learned trial judge erred when His Lordship ruled that common intention had been proved; and

(iv) that the learned trial judge erred when His Lordship failed to appreciate the defence of the second, third and sixth accused persons.

[27] Learned counsel for the seventh accused argued before us the following grounds in his submissions:

(i) there is no nexus between the seventh accused and all of the drugs and poisons found in the house;

(ii) failure of the learned trial judge to appreciate the seventh accused's explanation;

(iii) common intention had not been proven as against the seventh accused person;

(iv) there is no link between seventh accused person and the alleged manufacturing activities;

(v) the investigating officer (SP19) should have been called as a rebuttal witness;

(vi) the learned trial judge applied the wrong standard of proof in the context of appreciating the seventh accused person's defence case; and

(vii) the learned trial judge had admitted inadmissible evidence, especially the urine report of the seventh accused (P115) which had no relevancy to the charges proffered against the seventh accused.

[28] Learned counsel for the first accused only raised one ground in his submissions before us ie, that there was no proper identification of the drugs and poisons exhibits tendered in court.

Our Findings

[29] We shall deal first with the grounds canvassed by Tuan Hj Hisyam Teh Poh Teik on behalf of second, third and sixth accused persons. In fact three grounds relied upon by learned counsel in his arguments were on no *prima facie* case. Likewise the grounds rellied by learned counsel for the seventh accused person also centered on the same issue of the failure of the trial judge to carry out maximum evaluation on the evidence adduced by the prosecution in deciding that there was a *prima facie* case against them.

[30] What constitutes a *prima facie* case was best explained by Augustine Paul JCA (as he then was) in *Balachandran v. PP* [2005] 1 CLJ 85. His Lordship said:

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase "*prima facie* case" in s. 180. Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s. 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th edn as:
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> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be

believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

[31] It was further explained by His Lordship Gopal Sri Ram JCA (as he then was) in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457:

[12] After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See, *Tai Chai Keh v. Public Prosecutor* [1948-49] 1 MLJ Supp 105; *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before

me? See, *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[13] In *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215, Augustine Paul J described what a *prima facie* case is in the following terms:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

[32] Back to the instant appeals by the second, third, sixth and seventh accused persons, it was argued that they were not occupiers of the said house. They were only visitors. There was no evidence that they had the care or management of the said house. The fact that they were visitors to the said house was confirmed by the investigating officer (SP19). The second, third, sixth and seventh accused persons were not a member of the family. From the evidence of SP19, the following facts were eminent in respect of the second accused:

(i) he was not an occupier, that he was not a family member and that he was visiting the first accused on invitation before leaving for Penang (p. 983 AR vol. 5);

(ii) he came to the said house for two reasons, namely, to allow the sixth and seventh accused persons to visit and to have first accused's laptop repaired by the third accused (p. 990 AR vol. 5);

(iii) the third accused had in fact repaired the playstation PSP of the second accused (p. 1020 AR vol. 5); and

(iv) that his address is at Batu Maung, Penang (pp. 991 and 1020 AR vol. 5).

As to the third accused, the following facts were confirmed by SP19:

(i) that the third accused in fact lived and worked in Kuala Lumpur (pp. 985-986 AR vol. 5);

(ii) that the third accused did not own or rent the said house (p. 990 AR vol. 5);

(iii) that on the day of the said raid, the second accused had asked the third accused to come to fetch him and the two Chinese Nationals (the sixth and seventh accused) to leave for Kuala Lumpur and then for sightseeing to Penang (p. 990 AR vol. 5);

(iv) that on the day of the raid, the third accused just arrived at 10.30pm and he parked his car outside the said house and no clothes belonging to the third accused was found in the said house (p. 991 AR vol. 5).

In respect of the sixth and the seventh accused persons, the facts show:

(i) That their airline tickets showed that they arrived in Malaysia on 26 May 2010 and to remain here till 24 June 2010 (p. 999 AR vol. 5).

(ii) that from their cautioned statements the reason why they were in the said house was because the second accused brought them there to save costs as they were touring Malaysia (p. 1002 AR vol. 5);

(iii) that they knew only the second accused (p. 1002 AR vol. 5);

(iv) that on the night of 4 June 2010, the second, the sixth and the seventh accused persons just returned from Muar at about 10pm and about to sleep and were barely in the room for about three hours (p. 1004 AR vol. 5).

[33] It was argued that these are crucial aspects of the evidence which ought but not considered by the learned trial judge. It was further argued that the prosecution did not negate the above aspects of the evidence to say that they were not true.

[34] Still on the same first ground of appeal, learned counsel for the second, third and sixth accused persons and as well as counsel for the seventh accused argued that the trial judge did not consider other compelling circumstances before relying on proximity as the basis to prove possession. The mere physical proximity in itself does not prove that the second and the third accused persons were in possession of the said drugs and poisons in the first room downstairs let alone the rest of the drugs and poisons found in other parts of the said house. The same goes for the sixth and the seventh accused persons in the second room upstairs (*Melvani v. PP* [1971] 1 LNS 78; [2014] 2 MLJ 18 and *Yap Chin Chai v. PP* [2010] 4 CLJ 693).

[35] Ground two of the appeal by the second, third and sixth accused persons touching on the finding made by the learned trial judge that they were in the said house processing and manufacturing the drugs. Similar issue was raised by learned counsel for the seventh accused. At p. 58 AR vol. 1, the learned judge said:

> 12. Dalam senario yang dibentangkan kesemua OKT tidak berada di situ secara kebetulan. Kesemua mereka berada dalam rumah tersebut dengan bertujuan iaitu untuk memproses dan membuat dadah …

[36] We agree that the finding of the learned trial judge was erroneous as it was against the weight of evidence. We are mindful of the evidence adduced by the prosecution showing that the impugned drugs were at the state of ready for distribution and that at the time of arrests none of the accused persons were engaged in the processing or manufacturing of the drugs. There was no evidence that the drugs were in the process of being processed or manufactured. The trial judge had failed to consider that the chemist (SP5) found no traces of drugs on the clothes or bodies of the four accused persons and no finger printings or DNAs of all the accused persons on the paraphernalia found in the said house except on the cigarette butts and the smoking pipe. The fact that the second and third accused ran from the direction of the first room did not connect them with the acts of processing and/or manufacturing the drugs.

[37] On the discovery of the DNA evidence on the cigarette butts and the smoking pipe in the various rooms in the said house, the learned trial judge again made an erroneous finding. The finding or inference made was totally against the weight of evidence. At p. 74 AR vol. 1, His Lordship made a finding that:

> … keterangan DNA tersebut dengan jelas memberikan keterangan kritikal tentang nexus dan kesimpulan yang nyata ialah kesemua OKT telah bersepakat untuk sama-sama menjalankan perlakuan jenayah yang dipertuduhkan ie, pembuatan dadah tersebut dan sudah semestinya selaras dengan perancangan awal antara mereka.

[38] We agree that a few inferences can reasonably be made regarding the DNA found on the cigarette butts and the smoking pipe. As said earlier, no DNA was found on the drugs and paraphernalia exhibits produced in court. At most they were present in the rooms either smoking cigarettes or smoking pipes without more. Mere presence does not mean they were engaging in the act of processing or manufacturing. The trial judge therefore erred when His Lordship failed to analyse the evidence from all angles (*Gooi Loo Seng v. PP* [1993] 3 CLJ 1). We found that there was insufficient evidence to show that the second, the third, the sixth and the seventh accused persons were involved in the processing and manufacturing drugs as found by the learned trial judge.

[39] On the issue of common intention, it was submitted by counsel for the second, third, sixth and seventh accused persons that there was no hard evidence to back learned trial judge's finding that common intention of all the accused persons had been proven. There must be hard evidence to show that all the accused persons had pre-arranged minds or plans to traffic and posses the drugs and poisons and they were present at the said house as confederates. We agree that there was no hard and compelling evidence to show common intention of all the accused persons in this case (see: *Adiswaran Tharumaputrintar v. PP & Other Appeals* [2014] 3 CLJ 813; [2014] 3 MLRA 427).

[40] As regard to the second charge for trafficking in ketamine, the learned trial judge applied the wrong standard of proof in the contact of appreciating all the accused persons' explanation. At p. 62 AR vol. 1, the learned trial judge said that "Untuk ketamine pula, memandangkan ketiadaan apa-apa peruntukan anggapan di bawah s. 37(da) mengenainya, faktor-faktor aktiviti berkaitan dengan dadah tersebut terjatuh dalam kategori pembuatan dan juga penyimpanan dadah itu di bawah s. 2 ADB 1952". It seems that the learned trial judge was using direct evidence to establish the element of trafficking. But at p. 80 AR vol. 1, His Lordship used the presumption under s. 37(da) to prove trafficking and imposed a heavier burden of balance of probabilities on the accused persons. In his judgment, His Lordship decided:

> 28. Secara keseluruhan, berdasarkan prinsip kes *PP v. Mat* [1963] 1 MLJ 263 and *Abdul Rahim Abdul Razak v. PP* [2015] 2 CLJ 208, saya dapati OKT1, OKT2, OKT3, OKT5, OKT6 dan OKT7 telah gagal mematahkan anggapan seksyen 37(da) bagi pengedaran dadah berbahaya seperti dalam pertuduhan pertama dan kedua atas imbangan kebarangkalian.

[41] Another ground of appeal put up by learned counsel for the seventh accused was that the learned trial judge erred in facts and in law when His Lordship admitted the urine report (P115) which is irrelevant and inadmissible evidence to the charges preferred against the seventh accused. We agree with the learned counsel. The seventh accused was not charged in respect of self-administration of drugs to himself under s. 15(1)(a) of the DDA. Even though it was strongly objected by counsel, the learned trial judge admitted urine reports of the accused (P111 to P115) as evidence. We are of the view that the admissions of the urine reports were gravely prejudicial to the accused persons in this case. We hold that the prejudicial effect of such evidence outweighed its probative value.

[42] Another point raised on the same urine reports issue was that the urine reports was prepared by a science officer at the Pathology Department, Kuala Lumpur Hospital and the officer was not call to testify in court. The examination and analysis of the urine samples were done on 10 June 2010. At that time a science officer attached at the Hospital was not yet gazzeted as a qualified officer under s. 399(2) of the Criminal Procedure Code. Thus, the reports prepared was inadmissible as evidence in court (see: *Kamarul Farkaruddin Mohamed lwn. PP* [2013] 7 CLJ 636; *Mohd Roziman Saaidon & Anor v. PP* [2015] 9 CLJ 665).

[43] It is unfortunate that the learned trial judge not only admitted urine reports as part of the evidence for the prosecution, but His Lordship placed tremendous weight on such evidence. This can be seen from the learned trial judge's judgment at pp. 60-61 AR vol. 1, as follows:

> 15. Tambahan lagi, saya juga berpendapat bahawa kesemua OKT mempunyai pengetahuan akan dadah dan bahan racun tersebut. Pengetahuan mengenai dadah, sepertimana telah mantap kaedah pencariannya, boleh disimpulkan daripada fakta yang berikut:

(a) ...

(b) ...

(c) Urine OKT 1, 2, 3 dan 7 adalah positif Methamphetamine. Ini membuktikan mereka ada mengambil dadah tersebut dan semestinya mempunyai pengetahuan akan dadah tersebut memandangkan mereka dikelilingi atau berada di lautan dadah jenis itu;

(d) …

(e) Kesemua OKT boleh melihat dadah dan perlengkapan untuk membuat pil-pil dadah. Mereka juga bebas mengambil dadah di dalam rumah tersebut untuk memproses pil-pil dadah di rumah tersebut.

[44] We are of the view that the learned trial judge had clearly erred when His Lordship held that the element of knowledge had been proven after taking into account wrongful admission of inadmissible evidence. Inadmissible evidence is always inadmissible. The judgment of the learned trial judge was perverse and liable to be reversed by the appellate tribunal. In *Ahmad Ibrahim v. PP* [2012] 7 CLJ 445, His Lordship Azahar Mohamed JCA (now FCJ) discussed the effect of the wrong admission of irrelevant and inadmissible evidence, as follows:

This brings into focus the question whether there was occasioned any substantial miscarriage of justice to the appellant by reason of admission of irrelevant and inadmissible evidence. In this regard, the proviso to s. 60(1) of the Courts Judicature Act 1964 makes clear the powers of Court of Appeal as follows:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[13] Even more to the point is s. 167 of the Evidence Act 1950 which works in tandem with the proviso to s. 60. It provides:

> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[14] *The test to determine whether or not the judgment of a court should be reversed or altered on account of the wrongful admission of evidence is whether or not without that evidence there was sufficient evidence to justify the decision* (see: *Wong Kok Keong v. Regina* [1954] 1 LNS 125). The case of *Juraimi Husin v. PP* (1998) 2 CLJ 383 established the principle that *if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable*

A *doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record.* If the error or errors complained of do not have this effect, that it is the duty of this court to plainly say so and maintain the conviction. (emphasis added).

[45] The last ground of appeal taken by learned counsel for second, third
B and sixth accused persons and as well as by learned counsel for the seventh accused was that the learned trial judge did not sufficiently appreciate the defence of the accused persons. For the seventh accused, learned counsel submitted that his client's oral testimony in court confirmed his cautioned statement (D125). The gist of the sixth accused person's evidence was that
C he was a visitor to Malaysia and travelling outside China for the first time. He met the second accused and his girlfriend in China and decided to come to Malaysia after the seventh accused had invited him. The purpose was obviously for holidays. They arrived at the KLIA on 27 May 2010. They stayed in a hotel in Times Square in Kuala Lumpur before they went to Malacca on 31 May 2010 in the third accused's car. They went to Malacca
D and Muar and planned to go to Penang. The sixth accused only knew the seventh accused apart from second accused whom he met in China on 23 May 2010. The second accused brought him to the said house to save costs and for sightseeing. He and the seventh accused stayed in the upper level room of the said house which is the room for the children of the said
E house to play. The sixth accused averred that he never saw the drugs or had anything to do with them. Learned counsel argued that the learned trial judge did not consider the cautioned statement (D125) of the sixth accused and this is an appealable error.

[46] Learned counsel further submitted that the learned trial judge had
F failed to consider the consistencies between the defence of the sixth accused and that of the second, third and the seventh accused. Learned trial judge also had failed to consider that the urine of the sixth accused was negative of drugs. His Lordship also had failed to consider that the prosecution has not provided any physical evidence to show the nexus between the sixth accused
G and the drugs and poisons in the said house and lastly, for failure to consider the sixth accused's explanation of his presence in the said house.

[47] As regard to the second and third accused persons, both of them gave evidence under oath and that their testimonies had been tested under cross-examination. The second accused's testimony can be summarised as follows:

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(a) he knew the first accused prior to the police raid and he resides in Penang.

(b) he was in China to visit his girlfriend and returned to Malaysia with both the sixth and seventh accused persons;

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(c) he confirmed that both the sixth and seventh accused persons were here for holidays;

(d) that they were in Kuala Lumpur until 31 May 2010 when they left for Malacca in the third accused's car and visited the first accused. The second accused had wanted to stay in a hotel but the first accused offered his house which he accepted;

(e) that they went sightseeing in Malacca and in Muar. He gave a narration of what they did in Malacca and in Muar till the police raid; and

(f) that on the day of the police raid when he was in Muar he had phoned the third accused to come to first accused's house to fetch them to Penang and at the same time to repair the PSP/computer of the first accused. It was the second accused's version that the third accused was repairing the computer when the police raided the said house. The second accused also denied any connection with the drugs and poisons found in the said house.

[48] The third accused defence can be summarised as follows:

(a) he stayed in Kuala Lumpur and is a businessman. Together with his father they are directors of Nadi Kristal Sdn Bhd;

(b) he tendered numerous certificates to support his qualifications in computers and computer repairing;

(c) he knew the second accused through one Ah Keong;

(d) the second accused had requested him to send him as well as the sixth and the seventh accused persons to Malacca on 31 May 2010 and he did;

(e) the purpose of going to Malacca was sightseeing and initially the plan was to stay in a hotel and before that second accused suggested that they visited the first accused;

(f) they reached the first accused's house at about 10.30pm. He did not know the first accused and that was the first time he has been to the said house. They went out for food and then to karaoke and returned to the first accused's house at about 2am;

(g) he spent the night in the first accused's house and next morning he returned to Kuala Lumpur.

(h) on 3 June 2010 he received a call from the second accused inviting him to go to Penang and to fetch them there. He arrived at the first accused's house at about 10.30pm. In the said house, the first accused then asked him to repair a laptop and a PSP player belonging to the first accused.

(i) then the police raided the said house and he denied any nexus with the drugs and poisons recovered by the police in the said house.

[49] Learned counsel submitted that the learned trial judge erred in not considering the second and third accused persons defence in the following areas:

(a) in failing to consider the consistencies of the defence of the second, third, sixth and seventh accused persons;

(b) in describing that the defence of the second, third and sixth accused persons as a "pembohongan" when the evidence does not support such a finding;

(c) in failing to appreciate that the DNA evidence produced by the prosecution supports the defence of both the second and third accused persons that they were not in the said house to process the drugs and poisons neither to process or manufacture drugs;

(d) that the investigation officer (SP19) had confirmed that the second accused had requested the third accused to fetch the second, the sixth and the seventh accused persons to Kuala Lumpur and then to Penang, that SP19 also confirmed that the second accused had also requested the third accused to repair a laptop of the first accused;

(e) that both the second and third accused persons were not occupiers to the said house but mere visitors.

[50] Learned counsel for the seventh accused submitted before us that the learned trial judge had failed to maximally and judiciously consider the seventh accused's defence that in fact he was a mere guest at the said house. In short, it was argued that the trial judge did not take a maximum evaluation of the whole evidence at the close of the defence. The guilt of the accused persons can only be decided after the trial judge had gauged the total evidence by the prosecution and tested as against the defence evidence.

[51] In this context, we would only refer to the relevant parts of the judgment of the learned trial judge touching on the defence versions as at pp. 77-79 of AR vol. 1, as follows:

> 22. Saya juga telah meneliti keterangan-keterangan OKT2, OKT3, OKT6 dan OKT7. Secara intipatinya, pembelaan mereka amat ringkas iaitu mereka ialah pelawat dan bagi OKT6 dan OKT7 mereka merupakan pelancong dari Cina. OKT2 kemudiannya menjadi pemandu pelancong dengan membawa OKT 6 dan OKT7 ke Melaka dan kemudiannya ke Muar bersama OKT1. OKT3 pula selain menjadi rakan OKT2, juga merupakan pemandu pelancong kepada OKT6 dan OKT7 dan telah menawarkan bantunan untuk membawa mereka melancong ke Pulau Pinang.
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> 23. Kesemua mereka menafikan terlibat dalam apa-apa aktiviti dalam rumah tersebut. Kesemua OKT menafikan mengetahui tentang barang-barang kes, perlengkapan dan sebagainya yang melibatkan pemprosesan atau pembuatan dadah dalam rumah tersebut. Kesemua OKT juga menafikan terlibat dengan apa-apa dadah.

24. Daripada pembelaan mereka, OKT2, OKT3, OKT5, OKT6 dan OKT7 mengakui bahawa mereka telah pergi ke rumah OKT1 dan OKT4. Pada setiap masa kesemua OKT merujuk rumah itu sebagai rumah OKT1. Begitu juga dengan OKT5, pembantu rumah, juga mengatakan dia bekerja di rumah majikannya iaitu OKT1 dan OKT4. Namun begitu, dalam percakapan mereka, OKT1 dan OKT4 cuba mengasingkan diri dari rumah tersebut iaitu sebagai pemilik rumah dan telah juga mengasingkan diri mereka daripada mempunyai apa-apa hubungan dengan OKT2, OKT3, OKT6 dan OKT7.

25. Perkara ini amat tidak meyakinkan saya. Pada saya keterangan tersebut terjumlah kepada satu pembohongan iaitu seolah-olah apa yang hendak dipertegaskan di sini ialah mereka, iaitu OKT2, 3, 6 dan 7, hanya berada di rumah OKT1 untuk seketika, untuk singgah dan tidur, kemudian keluar melancong dan makan (sampai pagi). OKT3 pula datang untuk membaiki komputer dan kemudiannya untuk memandu mereka ke Pulau Pinang. Selain itu, mereka tidak berkesempatan untuk berbuat apa-apa yang lain di rumah OKT1 dan OKT4 kerana mereka sentiasa sibuk dengan aktiviti di atas.

26. Ini amat menghairankan dan tidak munasabah. Ini ditunjukkan dan diperjelaskan lagi dengan keterangan pihak pendakwaan, yang saya di peringkat ini diwajibkan untuk mempertimbangkan sekali lagi berdasarkan keseluruhan keterangan. Setelah dipertimbangkan, keterangan kesemua OKT diperingkat ini memantapkan lagi kes pendakwaan. Saya dapati pembelaan mereka dengan jelas merupakan penafian semata. Paling ketara, tidak ada satu pun penjelasan yang diberikan tentang bagaimana DNA OKT1, OKT2, OKT3, OKT6 dan OKT7 boleh berada di puntung rokok dan alatan yang lain yang disebut dalam keterangan dan laporan ekshibit P50 SP6 terutamanya di bilik 1 di mana terdapatnya kebanyakan dadah-dadah dan peralatan berkaitan dengan pemprosesan dan pembuatan dadah. Tidak ada langsung penjelasan daripada kesemua OKT berkenaan keterangan yang amat kritikal ini.

[52] By looking at the learned trial judge's judgment as quoted above, we agree with both learned counsel's complaint that the learned trial judge did not sufficiently appreciate the defence of the second, third, sixth and seventh accused persons especially in the areas highlighted by learned counsel. The cautioned statements of the accused were not considered at all by the trial judge. It is the bounden duty of the trial judge at the close of the defence case to judicially consider the explanations given by the defence witnesses in its entirety. We notice that the learned trial judge merely brushed aside the defence version by saying that they were bare denials. It appears to us from the judgment of the learned trial judge that His Lordship was so consumed and clouded by his conviction of the accuseds' guilt that he had overlooked to evaluate the whole of the evidence adduced at the end of the defence's case.

[53] In *Shah Rehan Abdul Rahman v. PP* [2015] 4 CLJ 71, His Lordship Balia Yusof Wahi JCA (now FCJ) had this to say on the similar issue in hand:

> [19] There are two aspects of the learned judge's consideration of the defence that merits our comment. Firstly, judges must again be reminded not to delve in the "believable and convincing" test in applying the "reasonable doubt" test. It is trite that an accused person need only raise a reasonable doubt. This was the reminder given by the Supreme Court in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. The learned judge in the instant appeal found the appellant's defence story to be unbelievable and unconvincing. While it is not wrong for His Lordship to conclude that the defence story is unbelievable/false and unconvincing, it is still incumbent on his part to consider whether the defence nevertheless had raised a reasonable doubt.
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> [20] Secondly, it is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution's case (per Mohamed Azmi SCJ in *Mohamad Radhi Yaakob v. PP (supra)* at p. 385).
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> [21] While it is perfectly proper that a judge may view with suspicion or disbelieve the defence story, he is still bound to consider the defence however weak, and to acquit only if he is not satisfied that the prosecution had discharged the burden of proof which rests upon it.
>
> [22] It is trite law that the explanation given by an accused has to be considered together with the rest of the evidence in the case and that he will be entitled to an acquittal if as result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that the fact exists (per Augustine Paul J (as he then was) in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 p. 683).
>
> [23] We are of the considered view that had the learned trial judge properly and sufficiently considered the explanation of the appellant in his defence and consider it together with the rest of all the evidence available, the probability of the defence story could not just be brushed aside.

[54] And in *Prasit Punyang v. PP* [2014] 7 CLJ 392; [2014] 1 MLRA 387, His Lordship Azahar Mohamed JCA (now FCJ) said as follows:

> [8] On the facts of the present case, we find there is merit in the contention of learned counsel for the appellant. In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and he shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term "all the evidence". The emphasis must be on the word "all". In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which the learned JC

should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt. The aim of this provision is obviously to make certain that an accused persons gets a fair trial. In the recent case of *Ahmad Mukamal Abdul Wahab & Ors v. PP* [2013] MLRAU 84, Hamid Sultan Abu Backer, JCA in delivering the judgment of this court has explained that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the accused) or for that matter a story by the accused to reach a just result.

...

[10] There is no doubt that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which he was charged. It never shifts. Whether the prosecution has proved its case beyond reasonable doubt depends upon the existence or otherwise of reasonable doubt in the evidence adduced before the court. It is a question of fact that the court has to determine at the conclusion of the trial with great care after taking into consideration the entire evidence and the circumstances prevailing in the case. In *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 1 MLRA 158, the Supreme Court said as follows:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?.

[11] It is true that generally a self-serving or exculpatory cautioned statement is not in itself evidence of the truth asserted therein. But then, it is the duty of the learned JC to consider and to analyse the cautioned statement that has been tendered as evidence by the appellant in support of his defence, that he had no prerequisite knowledge about the impugned cannabis found in the boat. The learned JC must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The appellant's cautioned statement was recorded a day after the arrest of the appellant. It is important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him. It follows from this that the defence of the appellant in the present case was not something that was sprung for the first time in the defence case (see: *Public Prosecutor v. Lin Lian Chen* [1992] 1 MLRA 297). The impact of the totality of the cautioned statement on the prosecution case or innocence of the appellant has to be kept in mind in coming to the conclusion as to the guilt of the appellant. However, in this case, the learned JC in his judgment merely said "semasa dilokap OKT memberi percakapan beliau kepada polis yang dimasukkan sebagai DI" (see p. 529

appeal record). Tellingly, however, the learned JC had failed to adequately direct his mind as to the truth of the appellant's version as stated in the cautioned statement (see: *Tan Ewe Huat v. PP* [2004] 1 MLRA 1).

[55] As earlier said, learned counsel for the first accused convassed only one ground of appeal before us ie, on the identification of the drugs. The complaint by the learned counsel was that the identification was only done based on the markings on the empty plastics packets without the contents (drugs). There was no photograph taken or shown as to what was the contents of the empty plastic packets. Learned counsel referred us to the notes of proceedings at pp. 493 to 499 of AR vol. 3.

[56] The relevant notes of proceedings was in respect of evidence given by the raiding officer, Insp Mohd Hisham bin Ab Rahman (SP10) during cross-examination. We produce below the evidence of SP10 regarding the markings and identification of the exhibits by the said witness, as follows:

S: Selepas merampas barang-barang ini, Encik Hisham ada buat penandaan tak?

J: Ada.

S: Di mana penandaan dibuat?

J: Di tempat kejadian.

S: Bagaimanakah Encik Hisham susun barang-barang supaya tidak campur antara barangan rampasan di tingkat bawah, dalam bilik, dalam stor? Macam mana kamu buat?

J: Macam pemeriksaan di dalam bilik tidur belakang tingkat bawah, saya kumpulkan dan saya letak di depan pintu masuk bilik tersebut dan mengarahkan Insp Hafiq bersama dengan 3 anggota untuk mengawal barang kes tersebut. Begitu juga dengan barang kes yang saya jumpai di bahagian ruang dapur. Selepas selesai tugas penandaan, saya longgokkan barang kes berhadapan dengan pintu masuk bilik tidur belakang iaitu di ruang antara dapur dengan pintu masuk bilik belakang. Manakala yang 1 beg yang berisi bungkusan yang mengandungi pil-pil ecstasy yang saya jumpai di atas lantai dalam bilik stor bawah tangga, saya sandang dan bawa beg tersebut. Seterusnya bagi pemeriksaan bilik tidur kedua di tingkat atas, saya longgokkan di hadapan di pintu keluar bilik tidur tersebut. Begitu juga dengan barang kes yang dijumpai di dalam bilik tidur ketiga, saya kumpulkan di depan pintu masuk bilik tidur ketiga. Akhir sekali bagi barang kes yang dijumpai di bawah meja di ruang tengah tingkat atas, saya longgokkan di berhampiran dengan meja tersebut.

S: Masa itu bila kamu buat penandaan?

J: Sewaktu pemeriksaan dijalankan, sesuatu barang kes dijumpai, saya akan buat penandaan dan juga draf berkenaan ekshibit yang dijumpai.

Mahkamah: Apa?

J: Saya buat tandaan dan saya catit di kertas.

S: Semasa kejadian itu?

J: Ya.

TPR: Saya pergi penandaan ekshibit yang dibuat Yang Arif dan saya terus ke pengecaman ekshibit yang dirampas.

Mahkamah: Ya.

S: Encik Hisham, boleh beritahu Mahkamah dari awal rampasan barang-barang kes ini, apakah tandaan yang dibuat?

J: Saya membuat tandaan dengan huruf, tandatangan dan tarikh pada setiap ekshibit yang dirampas.

S: Satu paket lut sinar yang berisi syabu. Apakah tandaan dibuat?

J: Saya tandakan dengan huruf A, tandatangan dan tarikh rampasan pada ekshibit tersebut.

S: Sila rujuk ekshibit P20(1). Inikah ekshibit yang berisi bahan syabu yang bertanda A itu?

J: Ya.

S: Ada syabu dalam itu?

J: Ada sisa-sisa syabu di dalam paket plastik tersebut.

S: Inikah syabu?

J: Ya.

Mahkamah: Kamu rujuk ke mana?

TPR: Saya rujuk kepada P20(2).

Mahkamah: Yang kata sisa-sisa ini dekat mana?

TPR: Di paket P20(1).

S: Rujuk P20(2). Apakah bahan yang di dalamnya?

J: Bahan yang disyaki syabu

(Paket P20(1) dan paket P20(2) dicamkan)

S: Satu paket berisi plastik lut sinar berisi kertas turas putih yang mengandungi ecstasy yang disyaki syabu. Rujuk P20(3).

Adakah ini plastik yang berisi kertas turas putih itu?

J: Ya, saya camkan melalui label B, tandatangan dan tarikh rampasan pada paket tersebut.

Mahkamah: Iaitu 4/6/2010, betul?

J: Ya. (P20(3) dicamkan.)

S: P20(4). Inikah kertas turas putih tersebut?

J: Ya. P20(4) dicamkan.)

S: 2 paket plastik lut sinar berisi syabu dan ketulan kecil warna merah jambu disyaki dadah ecstasy. Apakah tanda dibuat?

J: Saya tandakan dengan huruf C1 dan C2, tandatangan dan tarikh rampasan.

S: Rujuk paket P20(5) dan P20(6). Adakah ini paket yang bertanda C1. Rujuk P20 (5).

J: Ya. Saya camkan melalui label, tandatangan dan tarikh rampasan pada plastik tersebut.

(P20(5) dicamkan.)

S: Adakah ini paket yang bertanda C2?

J: Ya. Saya camkan melalui label, tandatangan dan tarikh rampasan pada plastik tersebut.

(P20(6) dicamkan.)

S: Rujuk P20(7). Inikah serbuk warna merah jambu yang terdapat dalam paket C1 dan C2?

J: Ya. (P20(7) dicamkan.)

S: 2 paket plastik lut sinar berisi bahan putih yang disyaki ketamine. Apakah tanda yang dibuat?

J: Saya tandakan dengan label B1 dan B2.

S: Rujuk P20(8) dan P20 (9). Rujuk kepada P20(8). Inikah plastik lut sinar yang bertanda B1?

J: Saya camkan melalui label, tandatangan dan tarikh rampasan pada paket tersebut.

(P20(8) dicamkan.)

S: Adakah ini paket plastik lut sinar bertanda B2?

J: Saya camkan melalui label, tandatangan dan tarikh rampasan pada paket tersebut.

(P20(9) dicamkan.)

S: Rujuk P20(10). Adakah ini kandungan dalam paket D1 dan D2?

J: Ya, serbuk warna putih yang disyaki dadah ketamine.

Mahkamah: Ada label?

J: Tiada

TPR: Bahan yang dimasuki oleh ahli kimia.

S: 2 paket plastik lut sinar yang berisi bahan yang disyaki ecstasy.

Apakah tandanya?

J: Saya tanda dengan label E1 dan E2, tandatangan dan tarikh rampasan.

S: Rujuk kepada P20(11) dan P20(12). Adakah ini plastik yang ditanda E1?

J: Ya, saya camkan melalui label E1, tandatangan dan tarikh rampasan.

S: P20(11) dicamkan. Rujuk P20(12). Adakah ini plastik yang ditanda E2 tersebut?

J: Ya, saya camkan melalui label E2, tandatangan dan tarikh rampasan.

(P20(12) dicamkan.)

S: Rujuk P20(13). Adakah ini bahan serbuk kekuningan yang terdapat dalam paket E1 dan E2?

J: Ya.

S: P20(13) dicamkan. Seterusnya 1 paket plastik lut sinar yang berisi serbuk warna oren yang disyaki ecstasy itu ditanda apa?

J: Saya tandakan dengan label F, tandatangan dan tarikh rampasan pada paket plastik tersebut.

S: Rujuk P20(14). Inikah paket plastik yang mengandungi serbuk warna oren?

J: Ya. Saya camkan melalui label F, tandatangan dan tarikh rampasan pada paket plastik tersebut.

(P20(14) dicamkan.)

S: Rujuk P20(15). Inikah serbuk warna oren yang terdapat dalam plastik yang bertanda F tadi?

J: Ya. (P20(15) dicamkan.)

S: 3 bungkusan plastik lut sinar yang mengandungi paket-paket lut sinar kosong. Apakah tanda dibuat kepada plastik-plastik tersebut?

J: Saya tandakan dengan label G1, G2 Dan G3.

S: Rujuk paket P20(16), P20(17) dan P20(18). Rujuk paket P20(16). Inikah satu paket plastik yang mengandungi plastik kosong yang bertanda G1?

J: Ya. Saya cam melalui label, tandatangan dan tarikh rampasan pada paket plastik tersebut.

S: P20(16) dicamkan. Rujuk P20(17). Inikah plastik yang bertanda G2 yang mengandungi paket-paket plastik kosong?

J: Ya, saya camkan melalui G2, tandatangan dan tarikh pada paket plastik tersebut.

(P20(17) dicamkan.)

S: Rujuk P20(18). Inikah plastik yang berlabel G3 yang mengandungi paket-paket plastik kosong?

J: Ya. Saya camkan melalui label G3, tandatangan dan tarikh pada paket plastik tersebut.

(P20(18) dicamkan.)

S: Di atas katil dijumpai satu kotak plastik hitam jenama 'Portable' ditandakan apa?

J: Kotak hitam plastik itu saya tandakan huruf F, tandatangan dan tarikh rampasan.

[57] We did not agree with learned counsel's complaint. The absence of the actual drugs in the plastic packets can easily be explained through the evidence of SP5, the chemist who analysed the contents of the plastic packets handed to her by the investigating officer, SP19. SP5 in her evidence (pp. 159-349 AR vol. 1 and 2) clearly stated that before doing her scientific analysis of the drugs exhibits, she had homogenised the substances in the plastic packets. In order to homogenise the substances, it has to be taken out or separated from the plastic packets. It was her further evidence that after the analysis, the balance of the substances in homogenised form was put in plastic packets provided by her and marked with similar markings. Our view is that the complaint made by learned counsel for the first accused is bereft of any merits. We are satisfied that there was no break in the chain of evidence in respect of the drugs exhibits and there was no doubt as regard to the identity of the drug exhibits in this case.

Conclusion

[58] Having carefully scrutinised the evidence and having carefully examined the judgment of the learned trial judge, we are entirely satisfied that the convictions of the second, third, sixth and seventh accused persons are not safe. In the result, we allowed the appeal by the second, third, sixth and seventh accused persons. We set aside the decision of the learned trial judge. We quashed the convictions and sentences of the second, third, sixth and seventh accused persons. We acquitted and discharged them accordingly.

[59] As against the first accused, we are also entirely satisfied that the conviction of the first accused are safe. In the result, his appeal is dismissed. The convictions and sentences imposed upon him are affirmed.